

Hardison Logging and its insurance carrier, Workers Compensation Fund (referred to jointly as "Hardison" hereafter) ask the Utah Labor Commission to review Administrative Law Judge George's preliminary determination that D.C.B. is permanently and totally disabled under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Annotated).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12 and Utah Code Ann. §34A-2-801(3).

### **BACKGROUND AND ISSUES PRESENTED**

On August 4, 2000, Mr. B. was injured while working for Hardison. On November 16, 2000, Mr. B. filed an application with the Commission to obtain permanent total disability compensation. Judge George held a hearing on Mr. B.'s claim on July 26, 2004, and then issued his decision on March 31, 2005, concluding that Mr. B. had met the requirements of § 34A-2-413(1) of the Act for a preliminary finding of permanent total disability.

On April 29, 2005, Hardison requested Commission review of Judge George's decision. Specifically, Hardison contends that Judge George erred in certain evidentiary matters. Hardison also contends that Mr. B. has not met the Act's tests for permanent total disability.

### **FINDINGS OF FACT**

The Commission views the following undisputed facts as determinative of Mr. B.'s right to a preliminary determination of permanent total disability. The Commission adopts Judge George's findings of fact to the extent they are consistent with these findings.

Mr. B. was seriously injured when he was in a car accident at age 15. As a result, he has a low I.Q., poor memory, minimal reading skills and minimal math skills. Nevertheless, he found work in the timber industry, where he worked for 17 years, for several different employers, and with no physical restrictions. At the time of his work accident at Hardison, Mr. B. was working full time and earning \$650 per week.

On August 4, 2000, Mr. B. was assigned by Hardison to use a chain saw to trim limbs off felled trees. As he performed this task, another tree fell and hit him on his back and neck. He suffered permanent injuries to his cervical spine that left him with a 5% whole person impairment. He now has substantial limitations against carrying any appreciable weight, moving his head, stooping or bending, climbing ladders, or reaching with his arms. He also has limitations on his ability to sit and stand, and he requires frequent rest breaks. In light of his substantial preexisting mental limitations and his new work-related physical impairments, Mr. B. is unable to do any work that would otherwise be available to him.

### **DISCUSSION AND CONCLUSION OF LAW**

As already noted, Hardison challenges Judge George's decision on two grounds. First, Hardison contends Judge George erred by discounting the testimony of Hardison's vocational expert and by failing to admit hearsay evidence regarding accommodations Mr. B. had received from his employers. Second, Hardison challenges Judge George's determinations that Mr. B. was capable of working prior to his work accident, and that the work accident at Hardison was the direct cause of Mr. B.'s permanent total disability. Each of these contentions is discussed below.

Weight given to vocation expert regarding Mr. B.'s pre-accident capacity for gainful employment. At the hearing in this matter, Hardison submitted testimony from Nancy Morrill, a vocational counselor employed by Hardison's insurance carrier, that Mr. B.'s mental limitations prevented him from engaging in gainful employment even prior to the work accident. In a similar vein, she testified that no regular employment was available to Mr. B. because of these preexisting mental limitations. Although Judge George discounted Ms. Morrill's testimony as contradictory and confused, the Commission rejects Ms. Morrill's testimony for a more basic reason: It is at odds with the objective fact that Mr. B. **was** gainfully employed at the time of his accident, and had been gainfully employed for the previous 17 years. The Commission sees no need to discuss whether an individual was theoretically capable of work if that individual has already conclusively settled the question by, in fact, working.

Mr. B.'s work accident as the direct cause of his permanent total disability. Among § 34A-2-413's various prerequisites for preliminary finding of permanent total disability is the requirement that the subject work accident is the "direct cause" of the permanent total disability. Hardison argues that even before Mr. B.'s work accident, he already met all the requirements for permanent total disability. Consequently, according to Hardison, the work accident cannot be considered the direct cause of Mr. B.'s post-accident disability.

Hardison's argument does not square with the facts. Prior to Mr. B.'s work accident, he could not have met § 34A-2-413's requirements for permanent total disability if for no other reason than that he was actually employed. Stated another way, the evidence establishes that prior to his work accident, Mr. B. had compensated for his limited mental capacity by finding work that was largely physical in nature. The work accident deprived him of the physical ability to perform such work. On these facts, the Commission concludes that Mr. B.'s work accident and injury is the direct cause of his permanent total disability.

### **ORDER**

The Commission affirms Judge George's decision and denies Hardison's motion for review. This matter is remanded to the Adjudication Division for completion of the adjudication of Mr. B.'s claim for permanent total disability compensation. It is so ordered.

Dated this 12<sup>th</sup> day of October, 2005.

R. Lee Ellertson, Commissioner